

DEC 6 1978

MICHAEL RODAK, JR., CLERK

**In the Supreme Court of the
United States**

No. 78-430

EDGAR TODD, JR., AND ALICE TODD,
Petitioners

v.

**ASSOCIATED CREDIT BUREAU SERVICES,
INC., GENERAL CREDIT CONTROL, INC.,
AND HESS'S, INC.,**
Respondents

**RESPONSE OF GENERAL CREDIT CONTROL,
INC., OPPOSING PETITION FOR WRIT OF
CERTIORARI**

DENNIS W. ALEXANDER
*Attorney for Respondent,
General Credit Control,
Inc.*

ROBERTS, TRAUD & WALLITSCH
27 North 7th Street
Allentown, Pennsylvania 18101
(215) 437-9867

TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Questions Presented	2
Statement of Case	3
Argument:	
A. General Credit Control, Inc., Given the Definition of a "Consumer Reporting Agency" Under the Fair Credit Reporting Act, 15 U.S.C. §1801 a (f), and the Facts of This Case as Fully Set Forth in the Record, Is Not Subject to the Fair Credit Reporting Act	9
B. General Credit Control, Inc., Given the Definition of a "Consumer Report" Under the Fair Credit Reporting Act, 15 U.S.C. §1801 a (d), and the Facts of This Case, as Fully Set Forth in the Record, Did Not Issue a "Consumer Report" on Petitioners or Otherwise Violate the Fair Credit Reporting Act	14
C. The Arguments Advanced by Petitioners' Brief, as to Respondent, General Credit Control, Inc., Are Predicated or Misstated or Nonexistent Facts, and Assert Liability Based Upon Theories for Which Neither Case Precedent Nor Statutory Law Are Cited for Authority	20
Conclusion	25

TABLE OF CASES

Bellshaw v. Credit Bureau of Prescott, et al., 392 F. Supp. 356 (Ariz. 1975)	13
Peller v. Retail Credit Co., et al., 359 F. Supp. 1235 (N.D. Ga. 1973)	12, 13, 17, 18, 19
Porter v. Talbot Perkins Children's Services, et al., 355 F. Supp. 174 (S.D. NY 1973) ..	10, 11, 12, 26
Wood v. Holiday Inns, Inc., 508 F.2d 167 (5th Cir. 1975)	23

Preliminary Statement

PRELIMINARY STATEMENT

From time to time reference will be made in the text of this brief to the action and inaction of the various other parties to this litigation. Such reference will be made exclusively for the purpose of clarifying and amplifying the limited role of the Respondent, General Credit Control, Inc., regarding the accumulation, assimilation, and/or dissemination of information regarding Edgar Todd, Jr. and Alice Todd. Such references are not intended to infer any wrongdoing on the part of any of the other Respondents in this action nor do they necessarily reflect the beliefs of the Respondent, General Credit Control, Inc., but rather the sworn testimony of the various parties as recorded at the depositions of said parties.

QUESTIONS PRESENTED

The questions raised by Petitioners with respect to Respondent, General Credit Control, Inc., are twofold:

A. Is General Credit Control, Inc., a "Credit Reporting Agency" as defined by the Fair Credit Reporting Act, 15 U.S.C. §1681 a (f) ?

B. If General Credit Control, Inc., is a "Credit Reporting Agency" did it issue a "Consumer Report" with stale or misleading information re Petitioners or otherwise violate the Fair Credit Reporting Act, 15 U.S.C. §1680, et seq.?

STATEMENT OF CASE

Respondent, General Credit Control, Inc. (hereinafter referred to as "General"), is currently and was at all times relevant to this litigation a collection agency, solely and exclusively engaged in the business of collecting overdue and delinquent accounts payable belonging to local merchants, said merchants having been unsuccessful in their attempts to obtain payment on said accounts from the respective customers (Affidavit of Michael Shatsky (hereinafter "Shatsky"), p. 2). The business of General was to receive overdue and delinquent accounts payable from local merchants and thereafter attempt to effect collection of same on behalf of said merchants (Shatsky, p. 2). While the particular method utilized in this operation is set forth at length in the affidavit of Michael Shatsky, it can be stated, generally, that General would be advised by a local merchant of the identity, address, employer, amount owed to said merchant and date of last payment on said account in referring an account to General for collection (Shatsky, pp. 2-4); Deposition of Mrs. Ruth Rohrbach (hereinafter "Rohrbach", p. 60). Thereafter General would effect collection of said account, to the extent possible, and remit to the respective merchant a report of such collection along with the amount received, less the fee of General for collecting said monies (Shatsky, pp. 2-3; Rohrbach, p. 59). Upon receipt of the full amount owed on any given account, General would, in transmitting the final payment to the merchant in question, note that the account was now paid in full

Statement of Case

and General would thereafter close their file on said account (Shatsky, pp. 2-3; Rohrbach, p. 59).

One of the numerous clients serviced by General is Hess's, Inc. (hereinafter referred to as "Hess's"); and on June 17, 1973, General received for collection from Hess's the overdue and delinquent account of Edgar C. Todd, Jr., and Alice Todd (Shatsky, p. 3). The totality of information received by General from Hess's was contained on a 3 x 5 file card and consisted of the following:

"Mr. & Mrs. Edgar C. Todd, R. D. No. 1, Box 329-B, Slatington, Pennsylvania 18080

Alice 262-9540

Amount—\$1,227.20

Last Paid—3/72

Last Purchase—6/72

Employment—Richard Flores Catasauqua Truck Driver

Nearest Relative—Edgar Todd R1 Allentown, PA" (Shatsky, pp. 3-4)

After receipt of the above information, General attempted to contact the Todds on several occasions and finally succeeded in contacting them and setting up a payment plan for the liquidation of the current balance of One Thousand Two Hundred Twenty-Seven Dollars and Twenty Cents (\$1,227.20) owed to Hess's (Shatsky, p. 4).

Beginning on September 7, 1973, the Todds initiated payment of the above-noted amount with a remittance of Fifty Dollars (\$50.00) and thereafter continued to make payment to reduce the balance owed on the Hess's account

Statement of Case

until August 5, 1974, when they remitted One Hundred Dollars (\$100.00) to General. In early September of 1974, the Todds paid the remaining balance on their account with Hess's directly to Hess's (Deposition of Mrs. Todd (hereinafter "Mrs. Todd"), pp. 114-116; Rohrbach, p. 20 & Exhibit "1" thereof, pp. 5-6, p. 25). On September 10, 1974, General contacted Mrs. Todd and was informed by her that the remaining balance had been paid in full to Hess's (Shatsky, p. 5). This fact is contested by Mrs. Todd who contends she never contacted or was contacted by General after making the final payment to Hess's (Mrs. Todd, pp. 115-116). General contacted Hess's to confirm the representation of Mrs. Todd that the account was paid in full and learned from Hess's that full payment had been received of the remaining balance on said account (Shatsky, p. 5). The Hess's account of Edgar Todd, Jr. and Alice Todd having been paid in full, General's file on the Todds was closed and there was no further activity with regard to said file with two exceptions set forth in the next paragraph (Shatsky, p. 5).

Some months after General had closed their file on the Hess's account of Edgar Todd, Jr. and Alice Todd, a call was received from Mrs. Todd complaining to General that the Associated Credit Bureau Services, Inc. (hereinafter referred to as "Credit Bureau") file on Edgar Todd, Jr. and Alice Todd indicated an outstanding balance on the Hess's account (Shatsky, p. 5). Mr. Shatsky informed Mrs. Todd that he was not a member of nor responsible for the Credit Bureau and only reported to Hess's. Mr. Shatsky volunteered to, and thereafter did, however, contact Hess's and advise them of the problem at the Credit Bureau and that the Todd account was paid

Statement of Case

in full (Shatsky, p. 5). With the telephone call to Hess's no further action involving the Todd file re Hess's occurred until General was contacted by the attorney for the Plaintiffs and advised of the initiation of this lawsuit by the Petitioners against the Respondent, General (Shatsky, pp. 5-6).

Mrs. Todd's version of the above incident somewhat differs from Mr. Shatsky's. Upon being denied credit at Kern's Furniture, Mrs. Todd testified that she called the Respondent, Credit Bureau, and informed them that the Hess's bill had been paid in full (Mrs. Todd, p. 88). Thereafter Mrs. Todd testified she received a return call from the Credit Bureau indicating that they contacted Hess's and were unable to verify that her account had been paid (Mrs. Todd, p. 88). Mrs. Todd then testified that she advised the Credit Bureau to contact General and that the lady from the Credit Bureau thereafter contacted General (Mrs. Todd, p. 88). Mrs. Todd thereafter testified, "I guess that's how she finally got it straightened out then that it was paid," referring to the Credit Bureau's calling General (Mrs. Todd, p. 88). Thereafter, under cross-examination by counsel for General, Mrs. Todd admitted that she was not present when any call was made by the Credit Bureau to Respondent, General, that the lady at the Credit Bureau never stated she called General, and that Mrs. Todd did not recall whether or not she, herself, contacted General at about this time regarding the problem of the Hess's bill being carried as unpaid by the Credit Bureau (Mrs. Todd, pp. 114-116).

Prior to the initiation of this lawsuit, General made no disclosures of information regarding the Hess's account

Statement of Case

of Edgar Todd, Jr. and Alice Todd to anyone other than Hess's (Shatsky, pp. 5-6). Specifically with reference to the Credit Bureau, the deposition of Mr. Ronald C. Smith (hereinafter "Smith") sets forth that there is nothing in the records of the Credit Bureau to indicate that information was either solicited from or received from General (Smith, pp. 37, 48-50, 55-56, 67 & 69). The aforesaid references to the deposition of Mr. Ronald C. Smith clearly indicate that any solicitation or consideration of information by the Credit Bureau from General would be in violation of their operation procedures. Further, the deposition of Mr. Randall Skeath indicates that his employer, Kern's Furniture Store, never received any consumer credit reports on the Todds from General.

On cross-examination during her deposition Mrs. Alice Todd was unable to set forth one particular instance in which a consumer credit report was issued by General to any third party (Mrs. Todd, pp. 118-122). The very most she was able to testify to in this respect was that Michael Shatsky of General stated that if she encountered any difficulty in attempting to buy a television he would be glad to indicate that she had been making orderly payments on her Hess's account which had been placed with him for collection. There was no evidence that the television store, Kleckner's, ever requested or received any information from General (Mrs. Todd, p. 120).

Petitioners' statement of facts is incorrect and materially misrepresents the facts of this case insofar as Petitioners' Brief states on pages 10-11:

"In August of 1973, the Plaintiffs' account was turned over to Defendant, General Credit Control,

Statement of Case

Inc. (hereinafter "General") for collection with the Defendant, General, being aware that the Defendant, Associated, was advised that the account was delinquent."

Respondent, General Credit Control, Inc., notes that no citation to the record is provided in support of the allegation that General Credit Control, Inc., was "aware that Defendant, Associated, was advised that the [Todd] account was delinquent." The record is barren of any inference of such a fact, let alone a statement to that effect, and the affidavit of Michael Shatsky (Shatsky, p. 4), sets forth the sum total information transmitted by Hess's to General Credit Control, Inc.; and, as a review of that affidavit will indicate, there is no reference therein to the Credit Bureau or the placing of any report to any third person by Hess's with respect to the Todds.

Argument

ARGUMENT

A. General Credit Control, Inc., given the definition of a "Consumer Reporting Agency" under the Fair Credit Reporting Act, 15 U.S.C. §1801 a (f), and the facts of this case as fully set forth in the record, is not subject to the Fair Credit Reporting Act.

B. General Credit Control, Inc., given the definition of a "Consumer Report" under the Fair Credit Reporting Act, 15 U.S.C. §1801 a (d), and the facts of this case, as fully set forth in the record, did not issue a "Consumer Report" on Petitioners or otherwise violate the Fair Credit Reporting Act.

C. The Arguments advanced by Petitioners' Brief, as to Respondent General Credit Control, Inc., are predicated or misstated or nonexistent facts, and assert liability based upon theories for which neither case precedent nor statutory law are cited for authority.

A. General Credit Control, Inc., Given the Definition of a "Consumer Reporting Agency" Under the Fair Credit Reporting Act, 15 U.S.C. §1801 a (f), and the Facts of This Case as Fully Set Forth in the Record, Is Not Subject to the Fair Credit Reporting Act

It is the contention of the Respondent, General, that the resolution of this issue is dispositive of General's mo-

Argument

tion to dismiss or, in the alternative, for summary judgment. If it be determined that the facts, even when considered in the light most favorable to the Petitioners, fail to set forth any basis for a finding that General is a "consumer reporting agency" as defined in the Fair Credit Reporting Act, then General's motion to dismiss or, in the alternative, for summary judgment was properly granted. Judicial support of such an interpretation is found in the case of *Porter v. Talbot Perkins Children's Services, et al.*, 355 F.Supp. 174 (S.D. N.Y. 1973).

In *Porter v. Talbot Perkins Children's Services, et al.*, supra, the Federal District Court for the Southern District of New York was called upon to rule on the defendant's motion to dismiss or, in the alternative, for summary judgment. In that case the plaintiff had alleged a violation of the Fair Credit Reporting Act predicated on the release of information obtained from and through the plaintiff to third parties through whom the plaintiffs were attempting to adopt children.

After a preliminary review of the purpose of the Fair Credit Reporting Act, the Court turned its attention to the definition of "consumer reporting agency" as set forth in the Act.

"The consumer reporting agency, to which the Act is directed is defined as follows:

The term 'consumer reporting agency' means any person which, for monetary fees, dues, on a cooperative non-profit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer re-

Argument

ports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports. Section 1681 (a) (f)." 355 F.Supp. at 176.

Having thus set forth the statutory definition of a "consumer reporting agency" the Court then turned its attention to the significance of that definition in terms of the case before it.

"A finding that a perspective defendant fits within the definitional boundaries is a requisite to the imposition of procedural requirements and possible liabilities contained in the Act." 355 F.Supp. at 176.

With the above statement the Court in a clear and unequivocal fashion set forth as a prerequisite to any consideration of liability under the Act a finding that the defendant in question is, in fact, under the definition of the Act, a "consumer reporting agency." Absent such a preliminary threshold determination no cause of action can be made out under the Fair Credit Reporting Act, 15 U.S.C.A. Section 1680 et seq. (1974).

In attempting to arrive at a determination as to precisely who falls within the category of "consumer reporting agencies" the Court looked to the Federal Trade Commission's preliminary interpretations of the Act for guidance. One particular portion of the FTC's comments considered by the Court appeared particularly relevant to this case.

"However, there are many others who may from time to time function as consumer reporting agencies and, to the extent they issue consumer reports, they

Argument

will be covered by the Act. For example, some banks and finance companies have engaged in the practice of giving out credit information other than that which they have developed from their own ledgers. To the extent they give out information and experience gained from other creditors, such banks and finance companies would be functioning as consumer reporting agencies and would be required to comply with the terms of the Act. As indicated earlier, giving out a firm's own ledger experience does not make it a consumer reporting agency or the information a consumer report. In order to be a consumer reporting agency, the firm must engage 'in whole or in part' in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties. When a firm gives its own credit experience on a consumer to a credit bureau, that information does not constitute a consumer report." 355 F.Supp. at 177.

The above language appears particularly appropriate in this particular case because there is no question but that a collection agency in some instances may be a "consumer reporting agency" and subject to the provisions of the Act. In this particular case, however, as a review of the facts will confirm, General in no way functioned as a "consumer reporting agency" and never furnished a "consumer report" on Edgar Todd, Jr. and Alice Todd.

Two other cases in which Federal District Courts have been moved to dismiss or grant summary judgment in actions brought under the Fair Credit Reporting Act are *Peller v. Retail Credit Co., et al.*, 359 F.Supp. 1235

Argument

(N.D. Ga. 1973), and *Bellshaw v. Credit Bureau of Prescott, et al.*, 392 F.Supp. 356 (Ariz. 1975). In both of these actions one or more of the defendants moved for dismissal of the action against them or in lieu thereof summary judgment on their behalf. In both actions the Court reviewed the definition of a "consumer reporting agency" as set forth in the Fair Credit Reporting Act, 15 U.S.C.A. Section 1681 (a) (f) (1974). In both of these cases the Court looked specifically to the business activity of the respective defendants and considered whether or not those activities brought them within the realm of a "consumer reporting agency" as defined in the Act. In both cases the Court took a very strict view of the definition of a "consumer reporting agency" and was unwilling to expand by inference the otherwise clearly set forth parameters of that definition. In both *Bellshaw* and *Peller* the Courts found that the moving defendants were not "consumer reporting agencies" and granted their motions for dismissal or summary judgment.

A review of the conduct of General as set forth in the testimony taken to this point in this matter clearly indicates that General, while being a collection agency, nonetheless engages in no course of conduct which would bring it within the parameters of the definition of a consumer reporting agency under the Act. Clearly, General does not "regularly engage in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties" (emphasis added). As the depositions and affidavit presented in conjunction with the motion clearly indicate, General does not become involved or interested in any particular debtor

Argument

until such time as one of its clients refers an overdue and unpaid account to it for collection. At that time General has one interest, and one interest only, and that is the collection of that amount from that debtor. The only information accumulated by General regarding any particular debtor is the amount he is or has paid on said account and that information is transmitted to no one other than the creditor who referred the account to General for collection. Upon receipt of full payment on any given debtor's account said record in the possession of General is closed and no further reference is made to same nor is any information from same provided to any individual save the client who referred the account for collection.

In that all of the information available through testimony and affidavit at this time, even when considered in the light most favorable to the Petitioner, failed to set forth facts upon which a finding could be made that General is a "consumer reporting agency", the Respondent General's, motion to dismiss or, in the alternative, for summary judgment was properly granted.

B. General Credit Control, Inc., Given the Definition of a "Consumer Report" Under the Fair Credit Reporting Act, 15 U.S.C. §1801 a (d), and the Facts of This Case, as Fully Set Forth in the Record, Did Not Issue a "Consumer Report" on Petitioners or Otherwise Violate the Fair Credit Reporting Act

The gravamen of the Petitioners' complaint against the Respondent, General, as set forth in Count II of the

Argument

complaint in this matter alleges that the Respondent, General, on one or more occasions after September 1, 1974, issued consumer reports concerning the Petitioners to third parties containing credit information of disputed accuracy and that the Respondent, General, was either negligent in failing to follow or willfully failed to follow reasonable procedures to assure the maximum possible accuracy of information concerning the Petitioners in its files. The remaining allegations of Petitioners' complaint regarding Respondent, General, are mooted if it is determined that General never issued any consumer reports on or after September 1, 1974, regarding the Todds and was neither negligent nor willful in failing to follow reasonable procedures to assure the maximum possible accuracy of its files regarding the Petitioners.

The definition of a "consumer report" under the Fair Credit Reporting Act is set forth at 15 U.S.C.A. Section 1681 (a) (d) (1974) as follows:

"(d) The term 'consumer report' means any written, oral or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (a) credit or insurance to be used primarily for personal, family or household purposes, or (2) employment purposes, or (3) other purposes authorized under Section 1681 (b) of this title. The term does not include (A) any report containing information solely as to transactions or

Argument

experiences between the consumer and the person making the report; (B) any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device; or (C) any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer conveys his decision with respect to such requests, if the third party advises the consumer of the name and address of the person to whom the request was made and such person makes the disclosure to the consumer required under Section 1681(m) of this title."

Notwithstanding the expanse of definition of a "consumer report" as provided in the statute, for our purposes all consideration of whether or not General has furnished a "consumer report" can be resolved by reference to one small phrase of said definition. In the second sentence of the definition, we find the statement:

"The term 'consumer report' does not include (A) any report containing information solely as to transactions or experiences between the consumer and the person making the report;"

A careful review of the depositions and affidavit filed in this matter to date reflects not one scintilla of fact upon which it can be stated, or even inferred, that General ever possessed or transmitted to anyone information which was not based solely and exclusively upon its transactions or experiences with Edgar Todd, Jr. and Alice Todd. As the record clearly establishes the only information possessed by General regarding the Todds was the initial informa-

Argument

tion received from Hess's as to the amount owed on the overdue and delinquent account with Hess's and, thereafter, the record of payments received from the Todds in the reduction and eventual payment in full of that overdue account. The payments which reduced the aforesaid account were paid directly to General and were thereafter transmitted to Hess's.

In the previously cited case of *Peller v. Retail Credit Co., et al.*, 359 F.Supp. 1235 (N.D. Ga. 1973), the Court considered the very provision of the definition of a "consumer report" and found that the defendants who had moved for a dismissal of the complaint against them were entitled to same because of the previously discussed provision.

In the *Peller* case, Defendant Lincoln Zonn and Robly Hat, Inc., moved for dismissal of plaintiff's complaint against them alleging violations of 15 U.S.C. Section 1681. The Defendant, Robly Hat, Inc. had commissioned Defendant Lincoln Zonn to administer a polygraph examination to a prospective employee of Robly Hat, Inc. Zonn informed Robly that the plaintiff, the prospective employee in question, had showed deception regarding certain questions and thereafter Robly refused to employ the plaintiff. Sometime thereafter the plaintiff obtained employment with Arthur Anderson Company and worked with them until Arthur Anderson was informed by Defendant Retail Credit Company of the results of the polygraph examination administered by Zonn on behalf of Robly.

Defendants Zonn and Robly moved for dismissal of the complaint as to them on the basis that they were not consumer reporting agencies and had not prepared a "con-

Argument

sumer report" regarding the plaintiff. The Court in reviewing the definition of a "consumer report" gave particular deference to the clause "the term does not include (A) any report containing information solely as to transactions or experiences between the consumer and the person making the report;" 359 F.Supp. at 1237. Having reviewed the facts of the case and noting the above definition the Court went on to state:

"Under the facts as alleged, it does not appear that Zonn or Robly engages in whole or in part in the process of assembling or evaluating consumer credit information or other information on consumers for purposes of furnishing consumer reports. Likewise, information given by Zonn to its clients does not constitute a consumer report as the Act specifically excludes from its definition of 'consumer report' 'any report containing information solely as to transactions or experiences between the consumer and the person making the report.'" 359 F.Supp. at 1237.

Thereafter, finding that neither Zonn nor Robly were "consumer reporting agencies" nor that Zonn had distributed a "consumer report", the Court granted the motion to dismiss to Defendants Zonn and Robly.

The *Peller* case is substantially analogous to that under review by this Court. In this case you have an independent contractor, General, in the business of servicing certain business agencies with a particular service, i.e., collection of overdue and delinquent accounts payable. There is also a Respondent, Hess's, which is in the same substantial status as Robly Hat, Inc. was in the *Peller*

Argument

case; that is a party in interest as to a particular individual for a limited purpose, i.e., the collection of an amount of money currently due and owing that merchant. Likewise, we have in this litigation a consumer reporting agency, the Credit Bureau, performing much the same function as that of the Respondent, Retail Credit Co., in the *Peller* case. On the basis of the rationale and legal standards applied in the *Peller* decision, the District Court was justified, and perhaps mandated, to grant the motion for dismissal or, in the alternative, summary judgment filed by Respondent, General.

Concerning the allegation that General either negligently or intentionally failed to maintain their records in an accurate fashion, the Respondent, General, again calls upon the Court to make a careful review of the depositions and the affidavit on file in this matter. There is nothing in any of those documents to reflect that any inaccuracy existed in the records of General regarding the Hess's account of Edgar Todd, Jr. and Alice Todd. As of September 10, 1974, the records of General reflected that the Hess's account of the Todds had been paid in full. Likewise, this fact was transmitted to Hess's even though the final payment which settled the account was made directly to Hess's. Lastly, the deposition of Mrs. Todd herself sets forth that she never had any dispute with General as to the remaining balance of her account during the period of time in which General had collected on said account.

On the strength of legal precedent set forth, as well as the statutory definition of "consumer report", the Respondent, General, was entitled to the dismissal of the complaint against it or summary judgment in its favor.

Argument

The depositions and affidavit in this case undeniably support this position and the evidence, even taken in the light most favorable to the Petitioner, fails to set forth any fact upon which a finding that General prepared or disseminated a "consumer report" could be based.

C. The Arguments Advanced by Petitioners' Brief, as to Respondent, General Credit Control, Inc., Are Predicated or Misstated or Nonexistent Facts, and Assert Liability Based Upon Theories for Which Neither Case Precedent Nor Statutory Law Are Cited for Authority

The first and, in light of the facts of this case, probably the most significant objection which Respondent, General, has to the argument of Petitioners is the incomplete and grossly misleading definition of "consumer report" set forth in Petitioners' Brief on page 28. After quoting merely one small phrase of a multiphrase definition, which is specific in the exceptions it sets forth, Petitioners state:

"Against these statutory definitions, the facts of the instant case must be examined." (Petitioners' Brief, p. 28)

Respondent, General, concurs with the Petitioners' position that the facts of the instant case must be examined in light of the statutory definitions of "consumer reporting agency" and "consumer report". Obviously, the entire definitions of those phrases must be considered and not merely the self-serving clauses which Petitioners have seen fit to reproduce in their brief. Those definitions

Argument

having been set forth heretofore in Sections A and B of this brief, further comment thereon at this point would be repetitive and improper.

Petitioners argue that Respondent, General, seeks to extend the holdings of the cases cited hereinabove in Sections A and B to be dispositive of the case before this Court. Respondent, General, notes that the questions of law currently before this Court on appeal are identical to the questions of law considered in those cases and it was based upon the resolution of those questions of law in each of the respective cases in question that the respective courts predicated their holding. In that respect, the considerations and rationale of those courts are directly relevant to the determination of the questions of law raised by Respondent, General, in its motion to dismiss or, in the alternative, for summary judgment. To the extent the respective Federal Courts in the cases in issue arrived at their ultimate holdings after making determinations of law, those determinations of law constitute judicial precedent for the position espoused by Respondent, General, in this case. Likewise, the application of the rationale and analysis utilized by those courts to the facts of this case compel the resolution of the issues raised herein in the very fashion the District Court disposed of same.

Petitioners argue that only banks were intended to be exempted from the confines of the Act as not being "consumer reporting agencies". In support of this proposition they cite the following excerpt from the legislative history:

"The House conferees also intend that the definition of 'consumer reporting agency' not include fi-

Argument

nancial institutions whose leading officers merely relayed information about an individual with whom they have had direct financial transactions." (Petitioners' Brief, p. 32).

A reading of the authority cited in proposition of Petitioners' position clearly indicates that it renders no support for that position whatsoever. Petitioners evidently ignore or do not see the word *also* in the first line of the statement they proffer in support of their position which clearly indicates that the House conferees intended that the definition of "consumer reporting agency" not include financial institutions of a certain type, *in addition to* any number of other institutions.

Petitioners argue that the Respondent, General, acted as an agent for the Respondent, Hess's, forming the third arm of the cooperative triangle of Associated-Hess's and General. (Petitioners' Brief, p. 38). As has been made abundantly clear heretofore in this brief, Respondent, General, had at no time any contact, membership in, association with, or ties to Respondent, Credit Bureau. As such, the descriptive allegation of Petitioners that Respondent, General, formed the third arm of the cooperative triangle is inappropriate, incorrect and grossly misleading. The formation of a triangle requires any given side to have a direct contact and connection to each of the other two sides. As the record makes apparent, no connection exists between Respondent, General, and Respondent, Credit Bureau.

With respect to this argument proffered by Petitioners, it is asserted that Respondent, General, while acting in its capacity as an independent contractor is somehow

Argument

vicariously liable, even if we accept the agency theory, for the misconduct of its principal. In this case, Petitioners would have the Court acknowledge the existence of vicarious liability of an agent for a principal's failure to act, where the agent had no knowledge of the facts giving rise to the alleged necessity of principal's acting, was unaware any action was necessary, and, perhaps more significant than anything else, was absolutely and unconditionally incapable of rendering the action allegedly required by his principal.

In support of this novel proposition of law, Petitioners offer the single case of *Wood v. Holiday Inns, Inc.*, 508 F.2d 167 (5th Cir. 1975) (Petitioners' Brief, pp. 39-40). At the conclusion of Petitioners' interpretation of the aforesaid opinion is stated:

"In reaching this result, the Court specifically indicated that the agency principals were applicable under the statute." (Petitioners' Brief, p. 40).

Respondent, General, believes that upon a careful and complete reading of the aforesaid opinion it will become patently clear to This Honorable Court that the Court in *Wood v. Holiday Inns, Inc.*, supra, made no finding with respect to vicarious liability of an agent for the conduct of its principal who had violated the Fair Credit Reporting Act. In fact, in that case, the Court found that the motel clerk in question had acted in a tortious fashion and that the principal of that clerk was liable for the tortious conduct of his agent which actions took place within the normal course of the agent's employment by the principal. In that the opinion cited in no way stands for the proposition or establishes the theory of law that an agent can

Argument

be vicariously liable for his principal's failure to comply with a statutory requirement, which requirement is unknown to the agent and compliance with which the agent is incapable of performing, Respondent, General, respectfully argues that there is no basis for the aforesaid proposition asserted by Petitioners and that it, therefore, be disregarded.

Finally, Petitioners argue that since Respondent, General, attempted collection of the monies owed to Defendant, Hess's, after efforts by Respondent, Credit Bureau, failed, the Respondent, General, was obligated to inform the Respondent, Credit Bureau, of the results of its actions on behalf of its client, Respondent, Hess's.

"Similarly, the Defendant, General obtained the monies—and its commission—and then did nothing to see that Defendant Associated, was advised that the account was now paid in full." (Petitioners' Brief, p. 45).

The aforesaid argument of Petitioners is based upon assumed facts, which do not exist, and a proposition of law for which no authority can be cited. As previously pointed out in the Statement of Case in this brief, the record is void of any inference, let alone statement of fact, which would indicate that Respondent, General, had any knowledge of the existence of a file being maintained on the Todds by Respondent, Credit Bureau. Likewise, there is nothing in the record which would indicate that Respondent, General, had any knowledge that Respondent, Hess's, had previously submitted the Todd account to Respondent, Credit Bureau, for collection and Respondent, Credit Bureau, was maintaining a record on the Todds.

Argument

Not being a member of the Respondent, Credit Bureau, having no knowledge of the existence of a file maintained by Respondent, Credit Bureau, with respect to the Todds; having no knowledge that Respondent, Hess's, had referred information with respect to the Todds to the Respondent, Credit Bureau; having no knowledge of the contents of the Respondent, Credit Bureau, account on the Todds with respect to the Hess's debt, the very existence of said account being unknown to Respondent, General; and, having no ability to effect any alteration in the records of Respondent, Credit Bureau, even if Respondent, General, had knowledge of the existence of a file reflecting improper information with respect to the Hess's account, it is inconceivable that Respondent, General, could in any way be liable for a violation of the Fair Credit Reporting Act.

CONCLUSION

A careful review of the depositions and affidavit, as well as the pleadings in this case, reflects that the only information which supports the position of the Petitioners is contained in the pleadings. The depositions taken in this case and the affidavit of Mr. Michael Shatsky are barren of any facts upon which even an inference that General Credit Control, Inc. is a consumer reporting agency can be based. Equally void of any support, even inferentially, is a proposition that a "consumer report" was either prepared or disseminated by General Credit Control, Inc. regarding the Hess's, Inc. account of Edgar Todd, Jr. and Alice Todd.

Argument

As was stated in the previously quoted case of *Porter v. Talbot Perkins Children's Services, et al.*:

"Plaintiff avers that there is such a purpose here; officers of the Defendant by affidavit declare the opposite. (Citation omitted.) When the movant comes forward with facts showing that his adversary's case is baseless, the opponent cannot rest on the allegations of the Complaint but must adduce factual material which raises a substantial question of the veracity or completeness of the movant's showing or presents countervailing facts. Here, Plaintiff has adduced no such facts." 355 F.Supp. at 1359.

In light of the foregoing the Respondent, General Credit Control, Inc., is entitled to denial of the petition for writ of certiorari and thereby an affirmation of the District Court's granting of summary judgment in favor of Respondent, General Credit Control, Inc.

Respectfully submitted,

ROBERTS, TRAUD & WALLITSCH,

By: DENNIS W. ALEXANDER,

Attorneys for Respondent, General Credit Control, Inc.